In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-365

TERRY BRUCE CREPS,
Petitioner,

v.

THE STATE OF NEVADA,
Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of The United States

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Terry Bruce Creps, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Nevada entered in the above-entitled case on June 28, 1978.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Nevada is printed in Appendix A hereto, infra, page 1. The said opinion constitutes the judgment of the Supreme Court of the State of Nevada.

JURISDICTION

Judgment of the Supreme Court of the State of Nevada was entered on June 28, 1978, by the filing of the opinion with the Clerk of said Supreme Court. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

QUESTION PRESENTED

Petitioner was convicted by a jury in the County District Court in Nevada of the offense of sale of a controlled substance to wit, cocaine, and was sentenced by the trial court judge to a term of sixty days in the Washoe County Jail, Reno, Nevada, as a condition of the suspension of a 5-½ year prison sentence and probation for five years. Petitioner contends that he was sentenced based upon facts or opinions known or held privately by the trial judge and not expressed to petitioner. The question herein is whether or not under the above stated circumstances petitioner was denied the due process of law guaranteed to him under the Fourteenth Amendment of the Constitution of the United States of America in his sentencing.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fourteenth Amendment to the Constitution of the United States of America set forth fully herein in Appendix B hereto, infra, page 1.

STATEMENT OF THE CASE

By information filed on June 8, 1976, in the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, petitioner was charged with the sale and possession of a controlled substance, to wit: cocaine, felonies. To this information petitioner entered a plea of not guilty and was subsequently tried before a jury on February 14, 15, 16, 17, and 18, 1977, in the said Second Judicial District Court of the State of Nevada in and for

the County of Washoe, the Honorable Roy L. Torvinen, District Judge, presiding. On February 18, 1977, the jury impaneled in the case returned a verdict finding petitioner guilty of the sale of cocaine, a felony. Judgment of conviction was entered by Judge Torvinen on March 22, 1977. After a hearing relative to the sentencing, Judge Torvinen sentenced petitioner as follows:

> To a term of 5-½ years in the Nevada State Prison, said prison term to be suspended, and probation granted to petitioner for a period of 5 years on the specific conditions that petitioner
>
> a. Pay a fine to the State of Nevada in the sum of $3,000.00;
>
> b. Submit himself and his property to searches and seizures without warrant;
>
> c. First serve a term of incarceration in the Washoe County Jail, Reno, Nevada, of sixty days.

Petitioner appealed to the Nevada Supreme Court his conviction and that portion of his sentence which required him to serve a term of sixty days in the Washoe County Jail as a condition of his probation, asserting various grounds in the Supreme Court for a reversal of that portion of his sentence. In his briefs to the Nevada Supreme Court on appeal, petitioner asserted, as he asserts now, that he was not afforded due process of law as guaranteed to him by the Fourteenth Amendment to the United States Constitution in his sentencing. Petitioner based this claim upon the record of proceedings had at his sentencing in which evidence favorable to a grant of probation to petitioner without incarceration was adduced, and at the conclusion of which Judge Torvinen announced that he was making his decision to order petitioner's incarceration based upon something "in the back of my mind", which the judge never disclosed to petitioner. Since petitioner was never informed by the sentencing judge of the specific reasons in the back

of his mind for imposing a term of incarceration upon him, petitioner was never afforded the opportunity to present evidence at his sentencing in explanation or in rebuttal of whatever it was in the judge's mind that caused him to conclude that the petitioner should be incarcerated.

As aforesaid, petitioner raised the question of this denial of due process in the Nevada Supreme Court in his briefs on appeal, and further in oral argument had before the Supreme Court on March 14, 1978. The Supreme Court of the State of Nevada made and filed with the Clerk thereof its opinion in petitioner's appeal. The filing of said opinion constituted entry of judgment by the Supreme Court of the State of Nevada. Rehearing was denied by order of the Nevada Supreme Court made and entered on July 26, 1978, a copy of said order denying rehearing is set forth fully herein in Appendix C hereto, infra, page 1. The remittitur of the Nevada Supreme Court was stayed pending petitioner's petition herein by order of the Nevada Supreme Court entered August 2, 1978, a copy of which order is set forth fully herein in Appendix D hereto, infra, page 1.

REASONS FOR GRANTING THE WRIT

This case does not involve a question of the propriety of evidence heard at petitioner's sentencing in light of due process requirements. It involves instead, the question of whether or not due process requires that a defendant be afforded the opportunity at his sentencing to hear the evidence considered by the court in passing sentence upon him and then thereupon have the opportunity to rebut or mitigate that evidence. In this case, the sentencing judge refused to articulate his reasons for passing the sentence imposed upon petitioner, putting petitioner in a position of not knowing why incarceration was imposed upon him and of being totally unable to even attempt to correct any

misconceptions that the judge may have had about him. It is just as likely as not that petitioner was sentenced on the basis of materially untrue assumptions concerning his past or other false information. Perhaps the court sentenced petitioner on false rumor or unreliable information. The record does not reflect whether this is the case or not, and, absent an ability to read the judge's mind, petitioner cannot know.

Thirty years ago this Honorable Court in *Townsend vs. Burke,* 344 U.S. 736 (1948) determined that where a defendant was sentenced ". . . on the basis of assumptions concerning his criminal record which were materially untrue, . . ." "such a result, whether caused by carelessness or design, is inconsistent with due process of law, and such a conviction cannot stand." (344 U.S. at 741) In this case, petitioner is unable to point to those assumptions employed by the sentencing judge in passing sentence upon him which were "materially untrue" because the record does not reflect the reasons employed by the court in sentencing petitioner. Whatever those reasons were, the trial judge kept them private and to himself. While due process is not offended by the sentencing court's taking a broad view of facts and circumstances in determining what sentence to impose, the facts and circumstances considered and relied on by the court must be correct. (See, *U.S. vs. Tucker,* 404 U.S. 443 (1972).) In *U.S. vs. Tucker, supra,* the defendant was remanded for resentencing due to the district court's reliance, in sentencing the defendant, upon two prior felony convictions which, unknown to the sentencing court, were invalid under *Gideon vs. Wainwright,* 372 U.S. 335. This court in *U.S. vs. Tucker, supra,* held

> "For the real question here is not whether the results of the Florida and Louisiana proceedings might have been different if the respondent had had counsel, but

> whether the sentence in the 1953 federal case might have been different if the sentencing judge had known that at least two of the respondent's previous convictions had been unconstitutionally obtained."

Would the outcome of petitioner's sentencing herein have been different if the trial court had disclosed the reasons for his sentencing of petitioner, and if petitioner had thereupon been able to demonstrate to the trial court that the assumptions relied upon by it were false? Assuming that the trial court would have acted fairly under the circumstances, that question must be answered in the affirmative. The problem herein is that petitioner was never allowed to take the first step, that is, to determine the assumptions relied upon by the trial court.

Since ". . . material false assumptions as to any facts relevant to sentencing, renders the entire sentencing procedure invalid as a violation of due process." *U.S. vs. Malcolm,* 432 F.2d 809, 816 (2nd Cir., 1970), this Honorable Court should order the remand of petitioner's case to the trial court for resentencing. In that sentencing, the trial court can then disclose the assumptions relied upon by it in sentencing petitioner, petitioner can present evidence to the court in regard thereto and the requirements of due process of law can then be satisfied. Absent such relief, petitioner's sentencing herein stands as an example of the utter disregard of the principles of fundamental fairness.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN OHLSON, JR.
Attorney for Petitioner

SINAI, OHLSON, SCHROEDER & SPECCHIO
Of Counsel

(Appendices Follow)

Appendix A

In the Supreme Court of the State of Nevada

No. 9798

Filed June 28, 1978

C. R. Davenport, Clerk of Supreme Court
By Judith McCulloch, Deputy Clerk

TERRY BRUCE CREPS,
Appellant,

vs.

THE STATE OF NEVADA,
Respondent.

Appeal from conviction and sentence for sale of controlled substance; Second Judicial District Court, Washoe County; Roy L. Torvinen, Judge.

Affirmed.

John Ohlson, Jr., of Reno,
for Appellant.

Larry R. Hicks, District Attorney,
and John N. Conner,
Deputy District Attorney,
Washoe County,
for Respondent.

OPINION

Per Curiam:

Terry Creps has appealed from his conviction and sentence for the sale of a controlled substance, alleging four errors: 1) that his motion to suppress a quantity of cocaine purchased by an undercover police agent was improperly

denied; 2) that his motion to dismiss, based upon an allegedly improper continuance granted to the State, was improperly denied; 3) that the trial court relied upon improper evidence in determining the sentence to be imposed, and 4) that the trial court exceeded both its constitutional and statutory powers when it imposed as a condition of probation a term of sixty days in the county jail. For the reasons that follow, we affirm both his conviction and the validity of the sentence imposed upon him.

1. *The Motion to Suppress*

Creps was arrested by officers of the Reno Police Department upon a prearranged signal from an undercover agent to whom Creps had just sold a quantity of cocaine. This agent had previously arranged with a third party to be introduced to Creps, met him at his residence where an agreement to buy was struck, and returned two hours later, wired for sound, with $1,000.00 in marked bills to consummate the sale. Creps argues that upon these facts, his motion to suppress the purchased cocaine, based upon the absence of a warrant, was improperly denied.

Crep's Fourth Amendment argument must fall under the authority of Lewis v. United States, 385 U.S. 206 (1966)[1] and its progeny. Under *Lewis,* a government agent may properly pose as a willing buyer to gain consensual entry into a private home to purchase narcotics, and thereafter use the purchase as evidence against the seller without vitiating an otherwise lawful prosecution. United States v. Raines, 536 F.2d 796, 799 (8th Cir. 1976). An agent's misrepresentation of his identity does not render invalid the seller's consent to the entry. As stated in United States v. Glassel, 488 F.2d 143, 145 (9th Cir. 1973), *cert den.* 416 U.S. 941 (1974):

> "[A]n officer may legitimately obtain an invitation into a house by misrepresenting his identity . . . . If he is invited inside, he does not need probable cause to enter, he does not need a warrant, and, quite obviously, he does not need to announce his authority and purpose."

Further, when a purchase of an illegal substance has been consummated after a consensual entry obtained through misrepresentation of identity, there has occurred neither a search for nor a seizure of the contraband. United States v. Dono, 428 F.2d 204, 209 (2nd. Cir.), *cert den. sub nom,* Bonaguro v. United States, 400 U.S 829 (1970). Creps "willingly entered into the transaction meaning it to be what it was, an illegal sale . . . to a willing buyer." *id. See also,* State v. Hollins, 533 S.W.2d 231, 233 (Mo. App. 1975); State v. Leppenen, 453 P.2d 172 (Ore. 1969). The purchased cocaine was therefore not inadmissible under the Fourth Amendment.

2. *The Motion for Continuance*

Trial was originally scheduled for Monday, December 6, 1976. On Friday, December 3, the State filed a motion for continuance, alleging the unavailability of an essential witness, the undercover police agent. Over Creps' objection, the motion was granted. On January 3, 1977, Creps' motion to dismiss the proceedings against him, based upon the allegedly improper grant of the State's motion for continuance, was denied.

District Court Rule 21 requires that a motion for continuance be supported by an affidavit stating:

1. Lewis v. United States, *supra,* was cited with approval on a related point in Crown v. Sheriff, 85 Nev. 522, 458 P.2d 357 (1969). However *Crown* does not deal with the particular constitutional challenge presented in this case.

"(a) The names of the absent witnesses and their present residences, if known.

(b) What diligence has been used to procure their attendance or their depositions, and the causes of a failure to procure the same.

(c) What the affiant has been informed and believes will be the testimony of each of such absent witnesses, and whether or not the same facts can be proved by other witnesses....

(d) At what time the applicant first learned that the attendance or depositions of such absent witnesses could not be obtained.

(e) That the application is made in good faith and not for delay merely."

Under D.Ct.Rule 21(3), "no continuance will be granted unless the affidavit upon which it is applied for conforms to this rule...."

The State's affidavit offered in support of its Dec. 3 motion for continuance is set out in the margin below.[2]

---

2. "RICHARD L. DAVENPORT, being first duly sworn, deposes and says: 1. That he is a Deputy District Attorney of Washoe County, State of Nevada, and attorney for the Plaintiff, THE STATE OF NEVADA, in the above-entitled action; 2. That the defendant has been charged with the crimes of Sale of a Controlled Substance and Possession of a Controlled Substance, felonies, and that a jury trial is now set for Monday, December 6, 1976 at the hour of 10:00 a.m.; 3. That .... is a crucial witness in the above described trial and that only she can testify to those events that transpired between her and a TERRY CREPS; 4. That your affiant received a telephone call from the said .... at approximately 1:20 p.m. on December 3, 1976; 5. At this time your affiant was informed by .... of the following: A) She had entered a hospital in Little Rock, Arkansas on Monday, November 29, 1976, and therein underwent abdominal surgery; B) That the said .... was released on Thursday, December 2, 1976 from said hospital; C) That .... was informed by her physician, DR. SELBY, that she is not to engage in travel for a period of three to four weeks; That your affiant believes that this Motion is made for good cause and there has never been a continuance previously in this case; and that said Motion is not made for the purposes of delay."

Analysis of this affidavit under D.C.R. 21 reveals the following possible deficiencies: a) no address is given for the agent, although the agent's present whereabouts is given; b) the description of the probable content of the agent's testimony is decidedly vague: the "events that transpired between her and Terry Creps," which only the agent could testify to, are not set forth in detail.

In applying the requirements of D.C.R. 21 at the appellate level, we have held that "[t]here is no presumption that good cause [for a continuance] exists . . . and the burden of showing good cause for delay is on the prosecution. Ex Parte Morris, 78 Nev. 123, 125, 369 P.2d 456 (1962)." McNair v. Sheriff, 89 Nev. 434, 436, 514 P.2d 1175 (1973). Nonetheless, we went on in *McNair* to observe at 89 Nev. 438:

"[O]ur aim being that criminal accusations should proceed or terminate on principles compatible with judicial economy, fair play, and reason, we have attempted to apply DCR 21 in the criminal realm firmly, consistently, but realistically."

In keeping with this policy of interpretation, we held in Rainsberger v. State, 76 Nev. 158, 160, 350 P.2d 995 (1960), that it is within the discretion of the trial court to grant a motion for a continuance upon the support of an affidavit "not in strict compliance with Rule 21. . . upon the showing that the application for continuance was made in good faith and not merely for delay." *See also,* Giorgetti v. Pecole, 69 Nev. 76, 241 P.2d 199 (1952).

When viewed in the light of the chain of events leading to the filing of the motion for continuance, the affidavit's deficiencies are clearly of the type which the trial court, acting within the scope of its discretion under *Rainsberger,* might well choose to overlook. The record reveals that the Deputy District Attorney first became aware that the agent

would be unable to travel at 1:20 p.m. on the Friday preceding a Monday 10:00 a.m. trial date. The motion and supporting affidavit were filed one hour later, after a hurried conference in chambers with the trial judge and Creps' attorney, during which the Deputy District Attorney was instructed by the judge to "hurry and get some papers up so we'[ll] have some sort of written record here." Upon the filing of the motion and affidavit, a hearing was held, at which the Deputy District Attorney offered to be sworn, and orally supplemented the affidavit with a more complete description of the agent's anticipated testimony and a description of a telephone call he had made to the agent's doctor in Arkansas to verify the agent's condition.

Clearly, the record reveals that the Deputy District Attorney acted with all possible dispatch. Moreover, the deviations from the dictates of D.C.R. 21 are both explainable under the particular circumstances of the motion and not of the type which would prejudice the defendant or subject him to avoidable delay. The court did not err in granting this continuance.

3. *The Evidence Supporting the Sentence*

Creps was sentenced to five and one-half years in the Nevada State Prison, suspended, probation for a period of five years conditioned upon payment of a fine, submission to warrantless searches, and a term of incarceration of sixty days in the Washoe County Jail. The trial judge apparently fashioned this sentence with the thought "in the back of [his] mind" that Creps "was heavily involved in drug traffic." Creps argues that because there was no admissible evidence of other transactions in which he had participated and no evidence of any other contraband at his residence, the trial judge must have relied upon "impalpable or highly suspect evidence", in violation of Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159 (1976).

However there was ample evidence properly admitted at the trial for the judge to have concluded that Creps, although a first offender, was more than a casual seller. The transaction for which he was prosecuted involved an ounce of cocaine with a street value of $1,800 and an offer to sell 10,000 amphetamines. Creps offered to do business on a regular basis. Upon this evidence, we find no abuse of discretion in the trial judge's sentence. Silks v. State, *supra.*

4. *The validity of the 60-Day Term of Incarceration as a Condition of Probation*

Under NRS 176.185(1), it is within the power of the trial court to "suspend the execution of the sentence imposed and *grant probation to the convicted person as the judge thereof deems advisable.*" In granting probation, "the court may *fix the terms and conditions thereof,*" NRS 176.185(3), and is authorized to "impose . . . *any* conditions of probation or suspension of sentence." NRS 176.205. (Emphasis supplied.) Despite the ostensibly unlimited nature of the power granted to the trial court to set conditions, Creps argues that a term of incarceration in the county jail is beyond the power of the trial court to impose as a condition of probation.[3]

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3. Even though there exists no specific authority for its use, Nevada district courts have apparently long assumed that a term of incarceration in the county jail is within the range of permissible conditions available to them in granting probation. In the recent study entitled "Comparative Analysis of Nevada Law, Rules, and Practice With the A.B.A. Standards of Criminal Justice," (1975), it is stated without supporting case law authority that "a sentencing judge may place a defendant upon probation conditioned upon his serving a stated period of time up to one year in the county jail." *Id.*, at 150.

Despite the apparent absence of any judicial doubt as to its propriety, incarceration appears to be seldom imposed as a condition of probation in Nevada. Records of the Identification and Communication Division of the Nevada Department of Law Enforcement Assistance reveal that of the 1,293 probations granted

Creps' challenge to the validity of the use of a short term of incarceration as a condition of probation is essentially twofold: first, that the imposition of such a condition impermissibly impinges upon the pardon and parole powers of the Executive Branch; and second, that even if no such constitutional conflicts arise from the imposition, a term of incarceration is so fundamentally inconsistent with the concept of probation as to have been beyond the scope of permissible conditions contemplated by the Legislature in enacting the sentencing scheme embodied in NRS Ch. 176.

a. Creps bases his "executive power conflict" argument on the authority of our holding in State v. District Court, 85 Nev. 485, 457 P.2d 217 (1969). In that case, we held it to be beyond the trial court's original sentencing power to suspend the execution of a ten-year prison sentence and place the convicted defendant on three years probation, conditioned upon serving two years in the Nevada State Prison. Such a sentence, we held, constituted in effect a "delayed parole", 85 Nev., *supra,* at 487, in derogation of the Legislature's specific allocation of the parole power to the Executive Branch. It was also suggested in *State v. District Court* that such a sentence might impinge upon the Executive's pardon power. 85 Nev., *supra,* at 487.

Despite the broad language of State v. District Court, *supra,*[4] it is clear that the power to alleviate a sentence

in Nevada district courts during the first three quarters of FY 1977-78, only fourteen were conditioned upon a term of incarceration in the county jail.

4. *In State v. District Court,* we quoted with approval the following excerpt from the 1916 case Ex Parte United States, 242 U.S. 27: "[T]he right to relieve from punishment, fixed by law and ascertained according to the methods by it provided, belongs to the executive department." Despite this language, the precise holding in *State v. District Court* is considerably narrower: that "the granting of any relief from punishment *after incarceration in the state prison* is an executive function . . . performed by the state board of parole commissioners . . . or by the state board of pardons commissioners." 85 Nev., *supra,* at 488. (Emphasis supplied.)

(probation/parole/commutation) and the power to vacate an underlying conviction (honorable discharge from probation/pardon) are to a large extent dually allocated by the Legislature pursuant to constitutional mandate between the Judicial and Executive branches of state government in overlapping fashion.[5] In *State v. District Court* we merely held that there do exist certain situations in which the Legislature could not have intended, because the Constitution did not permit, that the judicial and executive commutation powers should overlap, certain situations in which the power to alleviate a sentence is committed exclusively to one branch. The "parole power", we held in that case, was just such an exclusively-delegated power; once a person is incarcerated in the state prison and is subject to the power of the executive parole board, *see,* NRS 213.107-

5. Thus at the time of his sentencing, a convicted defendant is subject *both* to the judicial power to commute his sentence through probation and the executive commutation power exercised by the pardons board. *See,* NRS 176.185 and 213.010-100. Once on probation, he is again subject both to the judicial commutation power to terminate probation, *see,* NRS 176.215, and the executive commutation power exercised through the pardons board, *see,* NRS 213.010-100. Further, a fine imposed by the sentencing court may be alleviated at any time either by the court (NRS 176.085) or by the pardons board (NRS 213.060).

The power to vacate an underlying judgment of conviction (the "pardon" power) is also jointly allocated between the court (NRS 176.225, "honorable discharge from probation") and the executive (NRS 213.090).

This dual allocation of commutation and pardon powers between the judicial and executive branches of state government finds its constitutional basis in the 1950 amendment of Article 5, Section 14 of the Nevada Constitution. *See,* S.O.N. 1947, p. 875; S.O.N. 1949, p. 684. Prior to 1950, these powers were constitutionally confined to the Governor under Article 5, Section 13, or to the Governor acting in conjunction with the Attorney General and the justices of the Supreme Court under Article 5, Section 14. *See,* State v. Moran, 43 Nev. 150, 182 P. 927 (1919). The 1950 constitutional amendment authorized the Legislature to confer "upon the district courts authority to suspend the execution of sentences, fix the conditions for, and to grant probation . . . ."

290, the power to alleviate the sentence rests entirely with the executive branch.[6]

However when, as here, a convicted defendant is subjected as a condition of probation to a term of incarceration of sixty days in the county jail, there occurs no possible conflict with the exclusively-executive parole power such as existed in *State v. District Court.* First, in order to come within the scope of the executive parole power, a person must first have served at least one year in confinement. NRS 213.120. A term of incarceration of 60 days is thus not within those sentences the parole board has the power to touch. Further, while former NRS 176.190 (now 176.095) and NRS 213.110 (similarly codified after its amendment) both allowed the board of parole commissioners to grant parole to a person in the county jail, parole may now be granted only to persons confined in the Nevada state prison. *See,* S.O.N. 1969, Ch. 345, p. 598, A.B. 543 amending NRS 213.110. *See also,* Minutes, Senate Judiciary Committee, April 9, 1969, State Archives Book 30, p. 390; Minutes, Assembly Judiciary Committee, March 19, 1969, State Archives Book 22, p. 155. As stated in *State v. District Court,* the executive parole power comes into effect "after incarceration in the state prison," and not before. 85 Nev., *supra,* at 488.

We conclude, therefore, that the imposition of a term of incarceration of sixty days in the county jail as a condition

6. The sentence imposed by the trial court in *State v. District Court* is not directly prohibited under the Nevada Revised Statutes or the Nevada Constitution. See A IV. However the absence of any direct and explicit authority *for* such overlapping parole and probation powers, in light of the direct authority existing in the N.R.S. and the Constitution for *other* overlapping commutation powers (see footnote 5, *supra.*), and in light of the direct prohibition of *post-incarceration* remedial action by the courts (*see,* 176.185(3)), supports the conclusion in *State v. District Court* that no overlap was constitutionally or statutorily intended between the judicial probation and executive parole powers.

of probation does not represent a judicial intrusion into the exclusively-executive parole power. Moreover, to the extent that Creps is also subject during his term of incarceration to the executive commutation power under NRS 213.090, such overlapping commutation powers are clearly contemplated under the sentencing scheme set forth in Chapters 176 and 213 of the Nevada Revised Statutes and Article 5 of the Nevada Constitution.

b. Creps finally argues that even if a 60-day term of conditional incarceration suffers from no constitutional infirmity, the use of incarceration as a condition is so fundamentally inconsistent with the concept of probation that we must conclude it to be beyond the scope of permissible conditions contemplated by the Nevada Legislature in enacting NRS 176.185 and 176.205. He has cited us to a series of recent cases in which the courts of other states have concluded that the condition should not be permitted unless specifically authorized by statute. State v. Harris, 251 N.W. 2d 483 (Iowa 1977); State ex rel. St. Louis County v. Stussie, 556 S.W.2d 186 (Mo. 1977); State v. Marshall, 247 N.W.2d 484 (S.D. 1976); State v. Nuss, 212 N.W.2d 565 (Neb. 1973); People v. Ledford, 477 P.2d 374 (Colo. 1970); State v. Van Meter, 440 P.2d 58 (Ariz. App.) rev. den. (1968); White v. Burke, 43 F.2d 329 (10th Cir. 1930). The propriety of the use of incarceration as a condition of probation has been much debated; we note the contrary line of cases upholding its use in the absence of statutory prohibition. State v. Jones, 327 So.2d 18 (Fla. 1976); State ex rel Woodbury v. District Court, 495 P.2d 1119 (Mont. 1972); Franklin v. State, 392 P.2d 552 (Idaho 1964); Tabor v. Maxwell, 194 N.E.2d 856 (Ohio 1963); Breeding v. Swenson, 60 N.W.2d 4 (Minn. 1953); U.S. ex rel. Spellman v. Murphy, 217 F.2d 247 (7th Cir. 1954); Moore v. Patterson, 26 S.E.2d 319, 147 A.L.R. 653 (S.C. 1943).

The power to suspend sentence and grant probation springs from legislative grant rather than from the inherent powers of the court. State v. District Court, *supra;* State v. Abbott, 70 S.E. 6 (S.C. 1911); *but see,* State v. Jones, *supra.* Thus the primary enquiry in determining the range of permissible conditions under Ch. 176 must be the original and continuing legislative intent as reflected in the language of the enacted legislation. Further, the particularly ameliorative nature of probation statutes compels a liberal interpretation of the discretionary powers conferred on the district courts, Franklin v. State, *supra,* especially when, as here, there exists no danger of judicial intrusion into exclusively-executive realms. *See,* State v. District Court, *supra,* at 487.[7] Our analysis of the language and background of Ch. 176 reveals no compelling reason to conclude that the legislature intended to exclude incarceration from the range of permissible conditions of probation.

First, the language of NRS 176.185 and 176.205, as originally enacted in 1951,[8] fails to reveal any legislative

7. In State v. District Court, *supra,* we held that when there *did* exist a danger of interbranch jurisdictional conflict, the "statutory power [to suspend sentence] must be strictly construed." 85 Nev. at 487.

8. The district courts were first granted constitutional suspension and probation powers in 1951. S.O.N. 1951, Ch. 320, p. 527. An earlier statute authorizing the district court to "direct that . . . sentence be staid and suspended and that the defendant be released from custody on such conditions as the court may impose until otherwise ordered by such court" (Revised Statutes of Nevada, 1912, vol. 2, § 7259, p. 2034) was declared unconstitutional in State v. Moran, 43 Nev. 150, 182 P. 927 (1919). The Court held that although the statute had been widely relied upon by Nevada district courts since its enactment, it was in direct conflict with Article 5, § 14 of the Nevada Constitution, which delegated all pardon and commutation powers to the Governor acting alone or in conjunction with the Attorney General and the justices of the Supreme Court, 43 Nev., *supra,* at 153. Article 5, § 14 was amended in 1950 to authorize the Legislature to confer suspension and probation powers on the district courts. *See,* S.O.N. 1947, p. 875; S.O.N. 1949, p. 684; note 5, *supra.*

attempt to circumscribe or define the discretionary sentencing powers conferred on the district court. On the contrary, the legislative history of A.B. 207 reveals that the Probation Act was amended in the Senate specifically to *exclude* any legislative delineation of the options available to the district court, *see* Journal of the Senate, 1951, p. 343,[9] and to confer instead a broad and virtually unlimited discretion on the court to fashion sentencing dispositions

9. As originally proposed in and passed by the Assembly, A.B. 207 permitted the court to "(1) place the defendant on probation, or (2) impose a fine applicable to the offense and also place the defendant on probation, or (3) suspend the imposition or the execution of sentence." Journal of the Senate, 1951, p. 343. In White v. Burke, 43 F.2d 329 (10th Cir. 1930), former 18 U.S.C. 724, a section of the former Federal Probation Act substantially identical to A.B. 207 in its initial form, was construed not to allow the use of incarceration as a condition of probation. The court held that while the "broad language" of the first alternative disposition, standing alone, might well be construed to allow the condition, the specific enumeration of the lesser power to impose a fine as a condition of probation revealed a legislative intent to proscribe the more onerous condition of incarceration.

> "It is altogether unlikely that Congress would expressly give the power to require the payment of a fine and to place the defendant on probation, and leave to implication the power to require a serving of a portion of a term of imprisonment . . . . The grant of express power to impose the lesser punishment . . . excludes the power to impose the greater punishment . . . as a condition of probation."

43 F.2d, supra, at 330. *See also,* United States v. Greenhaus, 85 F.2d 116, 107 A.L.R. 630 (2nd Cir.), *cert den.* 299 U.S. 596 (1936); Archer v. Snook, 10 F.2d 567 (D.C. Ga. 1926); People v. Robinson, 235 N.W. 236 (Mich. 1931). *But see,* U.S. ex rel Spellman v. Murphy, 217 F.2d 247 (7th Cir. 1954); Moore v. Patterson, 26 S.E.2d 319, 147 A.L.R. 653 (S.C. 1943). The amendment of A.B. 207 to a form involving no legislative enumeration of permissible conditions renders these cases inapplicable in the interpretation of NRS Chapter 176.

Although NRS Ch. 176 was amended in 1969 and 1975 specifically to allow for the use of narcotics tests and restitution as conditions of probation, *see,* NRS 176.187, 176.189, the legislative history of NRS 176.189 reveals that it was designed only to "clarify" to the district courts the extent of their "inherent powers" under NRS Ch. 176, to impose probationary conditions. *See,* Journal of the Senate, 1975, p. 55-56.

according to the needs of the particular defendant. As enacted, A.B. 207 authorized the district court to "grant such probation . . . *as the judge . . . shall deem advisable,*" and conferred on the court *"full power to fix the terms and conditions thereof." See,* NRS 176.185.[10] Further, the court is authorized to "impose . . . *any* conditions of probation." *See,* NRS 176.205. Clearly, such broad language compels no automatic exclusion of a short term of incarceration in the county jail from the range of alternatives available to the district court.

Moreover, we do not believe the inclusion of a term of incarceration in the county jail within the set of permissible conditions available to the district courts under NRS 176.185 and 176.205 to run counter to any persuasive policy arguments advanced by courts in other jurisdictions. Creps cites us to many recent cases in which the argument is made that "probation" and "incarceration" of any sort or for any duration are fundamentally inconsistent concepts, the latter being both semantically inconsistent with the former,[11] and antithetical to its rehabilitative goals.[12] Even

10. NRS 176.185(3) was amended in 1975, resulting in the deletion of the phrase "shall have full power to" and the substitution therefor of the word "may". *See,* S.O.N. 1975, 84. We attach no importance to this minor change in language.

11. Thus it is often stated that probation and confinement "constitute a contradiction," State v. Harris, 251 N.W.2d 483 (Iowa 1977), and that incarceration in the county jail as a condition of probation "is the passing of a sentence, and not the suspension thereof. The fact that the court terms it a condition of probation does not render it any less a sentence of imprisonment." State v. Van Meter, 440 P.2d 58, 64 (Ariz.App.) (rev. den. 1968). *See,* Best and Birzon, "Conditions of Probation: An Analysis", 51 Geo. L.J. 809, 829 (1963): "Probation is based upon the premise that the offender has been found fit to re-enter society . . . . There is simply no way to reconcile incarceration to this premise."

12. Policy arguments most often advanced against the use of incarceration as a condition include a) that the shortness of the term of incarceration precludes the establishment of an institutional rehabilitative treatment plan, b) that local jails, in which such terms are usually served, are "typically poor" facilities; c) that a short term of incarceration has the adverse effect of separating the convicted person from the rehabilitative influences of his family and community; and d) that such a separation might well induce hostility on the part of the prisoner. *See,* "Seminar & Institute on Disparity of Sentences for the Sixth, Seventh, and Eighth Judicial Circuits," (1961) 30 F.R.D. 401, 445-459; State v. Marshall, 247 N.W.2d 484 (S.D. 1976).

discounting the factual and other peculiarities of several of these cases,[13] we remain unconvinced by their logic.

Whatever the "semantic content" of the term "probation" may once have been,[14] it can no longer be argued convincingly that "probation" necessarily involves an immediate release from incarceration. Through statutory amendment specifically to permit the imposition of incarceration as a condition of probation,[15] case law interpretation of stat-

13. In State ex rel St. Louis County v. Stussie, 556 S.W.2d 186 (Mo. 1977), for example, the court construed a long-standing statute placing no apparent limits on permissible conditions after the enactment, but before the effective date, of a new probation statute specifically authorizing the use of incarceration as a condition. In State v. Marshall, *supra,* at f.n. 12, the applicability of the probation statute exclusively to first offenders appears to have provided the basis for the court's holding that probation was designed as "an alternative to confinement." 247 N.W.2d, *supra,* 487.

14. The alleged contradiction between probation and any form of custodial detention appears to find its source in U.S. v. Murray, 275 U.S. 347, 357 (1928), where the Court, in dictum, characterized probation as "amelioration of the sentence by delaying actual execution, or providing a suspension so that the stigma might be withheld and an opportunity for repentance be granted *before actual imprisonment* should stain the life of the convict." (Emphasis supplied.)

15. The federal probation statute construed in White v. Burke, *supra,* f.n. 9, not to permit the use of incarceration was amended in 1958, Pub. L. No. 85-741, "to permit confinement in a jail-type institution . . . for a period not exceeding six months in connection with the grant of probation . . . ." Senate Report No. 2135, 1958 U.S.C.C.A.N., v. II, p. 3841. *See,* 18 U.S.C. 3651. California has long permitted the imposition of up to six months as a condition of probation. *See,* California Penal Code, § 1203.1. After State v. Van Meter, *supra,* f.n. 11, the Arizona probation statute was amended to allow the imposition of up to one year as a condition of probation. *See,* State v. Evans, 512 P.2d 1225 (Ariz. 1973).

utes which, like NRS 176.185 and 176.205, do not specifically enumerate a list of permissible conditions,[16] and scholarly commentary,[17] "probation" has come to signify less a necessary and immediate release from custody than a carefully tailored program of rehabilitation, potentially involving a short term of incarceration, judicially fashioned to suit the needs and character of a particular convicted person.

Moreover, we perceive no conflict between the essentially rehabilitative goals of the Nevada probation statutes and the use of a short term of incarceration as a condition thereof. That a short and definite term of confinement imposed as a condition of probation may have a substantial rehabilitative effect in certain cases has come to be widely recognized. *See,* Franklin v. State, *supra,* 392 P.2d 361-365, concurring and dissenting opinion. Significantly, both the A.B.A. "Project on Minimum Standards for Criminal Justice; Sentencing Alternatives and Procedures" (§ 2.4(a)(iii) Appr. Draft 1968) and the A.L.I. Model Penal Code (§ 6.02(3), alternative draft) specifically permit the imposition of a term of incarceration as a term of probation. The particular advantages in preserving its availability as a

16. Perhaps the most comprehensive treatment of the evolution of the concept appears in the concurring and dissenting opinion of Justice McQuade in Franklin v. State, *supra,* 392 P.2d at 561-565. Speaking for a majority of the Supreme Court of Idaho on the propriety of conditional incarceration, Justice McQuade declined to "restrict the meaning of probation so that it could never encompass incarceration. While such a restriction might have seemed reasonable twenty or thirty years ago, it is rapidly becoming apparent in this dynamic area of the law that probation signifies the employment of any reasonable measures which may be used to effectuate the rehabilitation of the defendant." 392 P.2d, *supra,* 562.

17. Best and Birzon, *supra,* at f.n. 11; "Seminar & Institute", *supra,* f.n. 12; Herlands, "When and How Should a Sentencing Judge Use Probation," Institute on Sentencing for U.S. District Court Judges (1964) 35 F.R.D. 381, 503; *Note,* "Judicial Review of Probation Conditions," 67 Colum.L.R. 181, 184-185 (1967).

sentencing alternative are best described in one of the Workshop conclusions reached at the "Seminar & Institute on Disparity of Sentences for the Sixth, Seventh, and Eighth Judicial Circuits," (1961), 30 F.R.D. 401, 445:

> "Many judges thought [conditioning probation upon a term of incarceration under 18 U.S.C. 3651] an appropriate disposition . . . because it combined the deterrent effect of imprisonment and achieved a 'shock treatment' of defendants who are unaware of the seriousness of their offense, retaining the advantages of probation where longer incarceration would serve no useful purpose."

See also, Franklin v. State, *supra,* 392 P.2d at 562. We believe that a short term of incarceration imposed as a condition of probation may in certain cases play a beneficial role in the rehabilitation of a convicted person, and that such a condition has a useful and proper place in the range of sentencing alternatives available to the district court under NRS 176.185 and 176.205.

Affirmed.

BATJER, C.J.
Batjer

MOWBRAY, J.
Mowbray

THOMPSON, J.
Thompson

GUNDERSON, J.
Gunderson

MANOUKIAN, J.
Manoukian

Attest: Actually true and correct copy.
C. R. Davenport, Clerk of the Supreme Court
By Judith McCulloch, Deputy.

Appendix B

U.S. CONSTITUTION

AMENDMENT XIV

[Rights of Citizens]

Section 1. Citizenship; privileges and immunities; due process; equal protection. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Apportionment of representation. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. Disqualification of officers. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to [25625] the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. Validity of public debt. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. Enforcement. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

[Proposed in 1866; adopted in 1868.]

Appendix C

IN THE SUPREME COURT OF THE
STATE OF NEVADA

TERRY BRUCE CREPS,
Appellant,

vs.

THE STATE OF NEVADA,
Respondent.

No. 9798

Filed Jul 26 1978

C. R. Davenport
Clerk of Supreme Court

By Judith McCulloch
Deputy Clerk

ORDER DENYING REHEARING

Rehearing denied.
It is so ORDERED.

BATJER, C. J.
Batjer, C. J.
MOWBRAY, J.
Mowbray, J.
THOMPSON, J.
Thompson, J.
GUNDERSON, J.
Gunderson, J.
MANOUKIAN, J.
Manoukian, J.

cc: Hon. Robert List, Attorney General
Hon. Roy L. Torvinen, District Judge
Hon. Larry R. Hicks, District Attorney
John L. Conner, Deputy District Attorney
Messrs. Sinai, Ohlson & Schroeder

Appendix D

IN THE SUPREME COURT OF THE
STATE OF NEVADA

TERRY BRUCE CREPS,
Appellant,

vs.

THE STATE OF NEVADA,
Respondent.

No. 9798

Filed Aug 2 1978

C. R. Davenport
Clerk of Supreme Court

By Judith McCulloch
Deputy Clerk

ORDER

Pursuant to appellant's "motion for stay of remittitur pending application for certiorari," we defer issuance of remittitur until September 5, 1978, NRAP 41(b).

It is so ORDERED.

Mowbray, A. C. J.

cc: Hon. Robert List, Attorney General
Hon. Larry R. Hicks, District Attorney
John L. Conner, Deputy District Attorney
Messrs. Sinai, Ohlson & Schroeder
Alex A. Coon, Clerk